

No more “Business as Usual”

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The Polish Constitutional Court (“the Court”), once a proud institution and an effective check on the will of the majority, is now a shell of its former self. It has become a dangerous and unhinged institution that uses the judicial review both as a sword to punish the opponents and to promote the illiberal agenda of the ruling majority. Thursday’s [abortion ruling](#) is only the [latest example](#). In these dark days we must always remember the old Constitutional Court and the liberal foundations it had laid for more than twenty years. More crucially, accepting the current constitutional oppression as “business as usual”, will carry the risk of losing the rule of law in Poland for good.

Calling out the present for what it is: a constitutional oppression

[The scars of the capture](#) had transformed the constitutional identity of the Court in three crucial registers: i) *unconstitutional composition*, both at the level of the judges and the President and Vice President; ii) growing participation of “irregular judges” in the cases heard by the Court in 2018 and the *ex post facto* validation by the very judges of their own unconstitutional appointment to the Court; iii) the day-to-day functioning is determined by the statutory scheme of intricate legislative provisions adopted by the majority in 2016 – 2017.

What [N. Walker](#) called the second lock of the control of the political system – the independence of the constitutional court – has been irreparably broken. The Court has accepted its new role to act as an extension of the will of Parliament and a government-enabler. It legitimates and shields the majority against challenges from the opposition. The only rationale for its existence is to minimize the uncertainty and deliver decisions that are swift and predictable from the perspective of the political majority. The extent to which fake “president J. Przybicka” is ready to serve the political majority by using judicial review as an instrument to oppress is simply breathtaking even for the most ardent supporters of PIS. The most recent and radical [abortion ruling](#) only corroborates that judicial review has become a blunt political sword wielded by a dangerous and unhinged institution ... The servility of Przybicka and her colleagues evokes the dark legacies of what [O. Kirchheimer](#) once called political justice. The aim of political justice is to enlarge the area of political action by enlisting the services of courts on behalf of political goals. Yet this is only half the truth. Courts apply laws, so without carefully crafted legislative schemes, the courts would be like craftsmen without tools. The correct law both circumscribes and empowers the judges in their mission. On the other hand, the law that traces its roots to, and espouses ideologies of, the old regime, cannot be trusted. As the political always prevails over the legal, law must reflect the political at all times, not the other way around.

The resort to court, as *Kirchheimer* argued, thus becomes a mere technical device for disposing of a vanquished rebel. It may signify a more or less concerted effort to rid the community of its stock of political foes, or it may be directed toward creating effective political images. So understood, political justice is the domain of populist constitutionalism and chimes in well with the avowed objective of constitutional capture: Taking over the institutions and making them “our institutions”. The normal course of proceedings and following the rules, are ridiculed as a ritual devoid of any meaning, one that strips the popular sense of justice, of its essence.

The Polish Constitutional Court A.D. 2020 is the prime example of [how courts matter to authoritarian regimes](#). The new trend is dictated by not only using but abusing the [increasing consequentialism](#) of courts wielding powers of judicial review. The ruling party does not need an independent Court because it clearly does not contemplate becoming a minority any time soon. And yet, it would be wrong to paint the Court as just a façade institution. Rather, it has been entrusted with a [crucial role](#) in the overall scheme of the captured state: that of a guarantor of the unconstitutional *status quo* and the chief architect of the effective political images. This latter lesson is important as it debunks the widely held view that populist authoritarians are *ex definitione* against the institutions of the state. Quite the contrary. They need institutions, but such that are subservient, compromised and ready to deliver political justice.

But is all hope lost? I still believe that are at least two narratives worth pursuing and promoting today. One is anchored in the past and the other challenges us in the present.

A peek into the past

The rule of law featured prominently in 1989 as one of the organizational paradigms of the reborn Poland. Poles looked at the rule of law as a gentle civilizer of the lawlessness and a check on the unlimited state power, both the hallmarks of the communist rule. Yet, the process of absorbing the rule of law standards was anything but straightforward given the lack of liberal foundations to fall back on. The Polish Constitutional Court played a special role in bringing the rule of law standards to the surface and holding the state authorities accountable. The 30-year jurisprudence of the Court has helped build the Court into one of the most respected constitutional courts in Europe and a living example of successful democratic transformation. Pre-2015 it has respected the choices made by the principal or, using M. Shapiro’s words, it acted prudently and has built credibility and legitimacy incomparably greater than that of other Polish public institutions.

According to art. 2 of the Polish Constitution of 1997 “Poland is a democratic state ruled by law and realizing the principles of social justice”. According to the leading treatise on Polish Constitutional law the rule of law is essentially equivalent to the sum of the principles of a modern democratic state. Among these principles one can find separation of powers, supremacy of the constitution, independence of the judiciary. *L. Garlicki* points out that the formal aspect of the rule of law is linked to art. 7 of the Constitution that mandates that all state authorities are to act wishing the bounds of the law. Whereas for the citizens all is allowed unless it is forbidden,

for the state authorities allowed is only what has been entrusted to them as their competence. This joint interpretation of art. 2 and 7 has met with the approval of the Court. It held that the competence of a state organ must never be presumed but have a basis in a valid legal norm. Otherwise, it does not exist (resolution of 10 May 1994 W 7/94). This formal aspect of the rule of law has never been questioned and came to be understood as one of the paradigmatic foundations of the III Republic.

What became more controversial was the substantive content of the clause “state governed by the rule of law”. The period of 1989 – 1997 is rightly considered as the most activist in the history of the Polish Constitutional Court. Faced with normative silence, the Court accepted that the rule of law is the source of, and foundation for, human rights to be protected. Among those rights were right to a court (case K 8/91), right to life (case K 26/96), right to privacy (case K 21/97). Then with the adoption of the long-awaited Constitution of 1997, art. 2 was to serve as the axiological basis for the catalogue of fundamental rights and freedoms guaranteed by the Constitution. The Constitution that was finally adopted in 1997 incorporated this case law and the Court has accepted that pre-1997 jurisprudence must continue after 1997 and that the rule of law clause will be interpreted in the same way (Judgment of 25 November 1997, Case K 26/97).

Importantly, art. 2 continued to serve as the measuring stick for the action by the legislative branch. A great number of principles of good legislation have been found to be reflected in art. 2. The majoritarian Parliament must not act in such a way as to undermine citizens’ trust in the state and its laws by arbitrary changes to the legislation or by setting legal traps. The good law must contribute to legal security felt across the board by all citizens and as such engine their trust in the state (see for example fundamental judgment of 25 June 2002, case K 45/01). As a result good legislation must obey a catalogue of legal principles like the protection of legitimate expectations, citizens’ trust in the state, state loyalty toward citizens, prohibition of *lex retro no agit* (Judgment of 19 November 2008, Case Kp 2/08), *vacatio legis* (Judgment of 8 April 1998, case K 10/97), protection of legitimate expectations and vested rights (Judgment of 20 December 1999 case K 4/99).

The Court went on to define the requirements for the procedural content of legislation: legal provisions that are not sufficiently clear for their addressees to foresee the legal consequences of their actions fly in the face of the state governed by law as expressed in art. 2 of the Constitution (Judgment of 14 September 2001, case SK 11/00). Of special importance is the impact of the rule of law on the sources of law and their ordaining. Here again the Court was instrumental in spelling out some of the most paradigmatic principles that underpin the legal system of Poland after 1989. Three systemic principles always played a special role. First, the principle of the preponderance of the Constitution (“constitution as the supreme law of the land”) and judicial review exercised by the Court as a necessary procedural safeguard of this principle. Second, exclusivity of the statute in regulating and defining the status of an individual which is a direct response to prevalent practice under the communist regime where citizens’ rights and obligations were left to the discretion of executive decree. Third, all governmental action must remain executive in character and aimed at implementing statutes.

In this way, the Court has laid the legal foundations. They should now serve as the axiological anchor and the symbolic point of reference for the days to come. Let us remember that this jurisprudence has never been cancelled out and must be seen as part of the institutional memory and tradition to fall back on in these days of constitutional oppression. This is an important story to be told and shared. That, however, requires an engaged story-teller as well as an interested audience.

Rejecting the comforting “business as usual”

Some of these arguments have been made in the past. Yet this repetition has a purpose here: it is utilized to save the constitutional review and the institutional memory of the old constitutional court and its legacy from oblivion. The pace of our daily life is relentless, and the news cycle never stops. We are being bombarded with ever-outrageous headlines (ordinary courts brought to the heel, shameless disciplinary proceedings decided under the cover of the night, unconstitutional Disciplinary Chamber of the Supreme Court throwing out the window the decisions of the Court of Justice, the list goes on) to the point where all these individual news become almost part of the new normal. The regularity of what in normal times would count as egregious violations of the rule of law makes the public immune and numb to these too-many-to-count developments. And at the same time the news and media channels read “the Constitutional Court has decided” or that “According to the President Julia Przybicka” etc. As a result of this masquerade the brazen unconstitutionality and illegality of the coup that has taken place in Poland becomes almost an afterthought and passes as ... the new normal.

The hopelessness and creeping public indifference regularize and endow it with a veneer of legitimacy. In the end nobody remembers how all this happened, who is a legal judge, what is wrong with the Disciplinary Chamber of the Supreme Court etc. The danger of short-time horizons of the public comes to the fore. This is exactly where an engaged story-teller is faced with the Herculean task to never stop repeating like mantra and reminding those who still listen that we are not living in a normal state. Accepting “business as usual” and going about one’s life in the shadows of the constitutional debacle indeed mark the final phase of the successful capture. The rejection of the comfortable and alluring in its simplicity “business as usual” takes on fundamental importance. The symbols matter more than ever. When media, some driven by tribal conviction, others by inexcusable editorial sloppiness and laziness, continue refer to Przybicka as Mrs. President, this is how unconstitutionality and illegality become entrenched and go by as unnoticed and silently become part of our daily life.

All this must go hand in hand with the bigger narrative that must be told, retold and be present out in the public discourse. As long as the mechanism of constitutional oppression persists on Szucha Street 12 in Warsaw where the Polish Constitutional Court used to have its seat, the rule of law in Poland has no chance. The choice is crystal clear: either we keep the memory of normal constitutional times and keep talking to the citizens in the spirit of these times or we will allow the ever-stronger illegal narrative and smart appearances of constitutionality (“Mrs President Przybicka”) drown out the constitutional fidelity and sense of propriety. Should the

latter prevail, the scales would be forever tipped in favour of the new unconstitutional normal.

In this battle, every engaged voice, every act of truth-telling and of remembering the foundational case law and calling things by their proper names counts. They do count just as much as every indifferent shrug or speech act that refers to the gentlemen sitting on the fake court as the “Judges of the Court”. The constitutional imagery and appearances of legality are seared into the minds of the citizenry as *consuetudo altera natura est*. In the end playing the game of appearances will become a new way of social life and will take on the semblance of normalcy. With such “business as usual” and contorted projection of reality, a final and fatal blow will be dealt to the rule of law in Poland.

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